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Supreme Court of the United States

October Term 1948

No. 701

GERALD F. COBLEIGH and
SLAWSBY REAL ESTATE CO., INC.
(Petitioners and Defendants below)

V.

TIGHE E. WOODS, Housing Expediter
Office of the Housing Expediter
(Respondent and Plaintiff below)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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NEIL TOLMAN
for Petitioners

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SUPREME COURT OF THE UNITED STATES

No. 701

GERALD F. COBLEIGH and
SLAWSBY REAL ESTATE CO., INC.

v.

TIGHE E. WOODS, Housing Expediter

PETITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Gerald F. Cobleigh and Slawsby Real Estate Co., Inc. pray for a writ of certiorari for review of the final decree of the Circuit Court of Appeals for the First Circuit, dated January 26, 1949, in the above entitled cause.

STATEMENT

These are actions brought by the Acting Housing Expediter of the office of the Housing Expediter to enjoin petitioners from demanding and receiving rents alleged to exceed legal maximum rents and to recover judgments for the plaintiff Housing Expediter and/or orders for restitution to the petitioners' tenants in accordance with the provisions of Section 925 (e) of the Price Control Extension Act of 1946 (R. 6, 7, 45, 46). Orders for restitution to petitioners' tenants in the amounts of $328.00 and $1,514.00 and judgments for plaintiff Housing Expediter for single damages of $328.00 and $1,514.00 were entered by the District Court

(R. 17-19, 55-56) in accordance with the opinions of that court (R. 11-17, 51-54) 75 F. Supp. 125, 75 F. Supp. 594 and were affirmed by the Circuit Court of Appeals (R. 67) in accordance with its opinion (R. 62-67) 172 F. 2d 167.

The petitioners are the owners and operators of an apartment building in Nashua, New Hampshire, containing thirty-two apartments. Certain rentals for these apartments were in effect on March 1, 1942, and continued in effect, under the provisions of the Rent Regulation for Housing issued under authority of the Emergency Price Control Act of 1942, up to and including June 30, 1946. On June 30, 1946, the Emergency Price Control Act of 1942 and the Housing Regulation issued thereunder expired. During the period between July 1, 1946, and July 25, 1946, the petitioners caused to be served on each of the tenants notices, valid under the laws of the State of New Hampshire, to the effect that on the next rent date their rent was increased $2 per week. During the period from July 1 to July 25 twenty-eight tenants commenced to pay weekly rentals $2 in excess of those which had been in effect during the period from March 1, 1942, through June 30, 1946. Petitioners continued to receive and the tenants in question to pay these increased rentals until the issuance of a restraining order by the District Court for the District of New Hampshire on March 12, 1947, (R. 9, 49).

At the trial in the District Court petitioners offered to prove:

(a) that the Price Administrator's agent examined the apartments at the request of the petitioners prior to the institution of this action and informed them that the rents as established between July 1, 1946, and July 25, 1946, were very reasonable and

(b) further stated to petitioners that the previous rent level had been so low that it had embarrassed the O.P.A. in considering other rents in that locality. This offer of proof was rejected. (R. 22-26)

STATUTE INVOLVED

Price Control Extension Act of 1946 (Public Law 548 approved July 25, 1946, 79th Congress, 50 USCA App. Section 901 a note) Section 18 (1):

The provisions of this Act shall take effect as of June 30, 1946 and

(2) all regulations, orders, price schedules and requirements under the Emergency Price Control Act of 1942 as amended * * * * and the Stabilization Act of 1942 as amended, which were in effect on June 30, 1946, shall be in effect in the same manner and to the same extent as if this Act had been enacted on June 30, 1946 * * * *. Provided further, that no act or transaction, or omission or failure to act, occurring subsequent to June 30, 1946, and prior to the date of the enactment of this Act shall be deemed to be a violation of the Emergency Price Control Act of 1942, as amended, or the Stabilization Act of 1942, as amended, or of any regulation or order, price schedule or requirement under either of such Acts. Provided further, that insofar as the provisions of this Act require the Administrator to make any change in any maximum price, such provisions shall not be deemed to require such change to be made before the thirtieth day following the date of enactment of this Act.

REGULATIONS INVOLVED

Rent Regulation For Housing. Section 4 Maximum Rents. "Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(a) Rented on maximum rent date. For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date.

"SECTION 1. Scope of this regulation - -

(a) Housing and defense-rental areas to which this regulation applies. This regulation applies to all housing accommodations within each of the defense-rental areas and each

of the portions of a defense-rental area (each of which is referred to hereinafter in this regulation as the 'defense-rental area'), which are listed in Schedule A of this regulation, except as provided in paragraph (b) of this section.

In Schedule A 'the maximum rent date' and 'the effective date of regulation' is given for each defense-rental area listed. * * * * Wherever the words 'the maximum rent date' or the words 'the effective date of regulation' are referred to in this regulation the dates given in Schedule A for the particular defense-rental area or portion of the defense-rental area in which the housing accommodations are located shall apply. * * * * *"

SCHEDULE A - - DEFENSE-RENTAL AREAS

	Maximum rent date	Effective date of regulation	Date of registration
Manchester, New Hampshire, Hillsborough	3|1|42	11|1|42	12|16|42

QUESTION PRESENTED

The question presented is the proper construction and the constitutionality as construed, of Section 18 of the Price Control Extension Act. The Court must determine whether that Act (1) purports to discriminate between existing contracts without adequate basis for the discrimination, (2) purports to encroach by legislative act upon the field of judicial power, and in either case, whether it is constitutional.

PETITIONERS' CONTENTIONS

The petitioners contend that the change in terms of the tenancy between petitioners and the twenty-eight tenants whose rentals increased between June 30, 1946, and July 25,

1946, was and continued to be an "act or transaction * * * * occurring subsequent to June 30, 1946, and prior to the enactment of this Act" within the meaning of Section 18 (2) of the Price Control Extension Act of 1947. They contend that the rentals as changed continued to be in force and unaffected by that Act until changed by a general or special order of the Price Administrator or his successors in authority, and that no such order has been issued. They contend that a requirement that such order be issued was intended by the language. "Provided further, that insofar as the provisions of this Act require the Administrator to make any change in any maximum price, such provisions shall not be deemed to require such change to be made before the thirtieth day following the enactment of this Act". They do not contend that they acquired vested rights by the change in the terms of tenancy between June 30 and July 26, 1946, but that the rights then acquired could constitutionally be affected only by administrative determination subject to judicial review. An administrative consciousness of the correctness of this contention is shown by the issuance of an administrative order relative to security deposits.

Section 2 Paragraph (d) of the original Rent Regulation for Housing as amended provided:

"(d) Security deposits - - (1) General prohibition. Regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, no person on or after September 1, 1944, shall demand or receive a security deposit for or in connection with the use or occupancy of housing accommodations within the Defense-Rental Area or retain any security deposit received prior to or on or after September 1, 1944, except as provided in this paragraph (d). The term 'security deposit,' in addition to its customary meaning, includes any prepayment of rent except payment in advance of the next periodic installment of rent for a period no longer than one month but shall not include rent voluntarily prepaid subsequent to possession by a tenant under a written lease for his own convenience."

On July 26, 1946, the Administrator issued an order which took effect as Amendment 97 to the Rent Regulation for Housing (11 F R 8164, effective July 26, 1946) which provided as follows:

"(8) Notwithstanding the preceding provisions of this paragraph (d), the demand, receipt, or retention of a security deposit contrary to such provisions between June 30, 1946, and July 25, 1946, shall not be a violation of this regulation; **Provided, however,** that the landlord shall refund such security deposit to the tenant within 30 days after July 25, 1946."

Petitioners contend that the proviso clause contemplated the issuance of a simi'ar general or special order by the Administrator to be essential to roll back petitioners' legal maximum rent to the level of March 1, 1942, if such was the administrator's intention.

It is the further contention of the petitioners that if Section 18 of the Price Control Extension Act of 1947 is construed as prohibiting, by legislative enactment, the continued collection of rentals in accordance with a change in the terms of a tenancy occurring between July 1, 1946, and July 25, 1946, in a Defense-Rental area said Section is unconstitutional as repugnant to the provisions of the Fifth Amendment to the Constitution of the United States.

It violates the provisions of the Fifth Amendment by depriving petitioners of property without due process of law. First, it discriminates between landlords in defense rental areas and landlords in other areas without adequate basis for the discrimination. Second, it purports to effect by legislative enactment without providing for judicial review a change in the property rights of the appellants. If the petitioners' contract of tenancy were alte ble only by administrative action, as they contend, petitioners would have an opportunity to obtain judicial review of the action taken by the administrator and be heard on the question of the fairness and necessity for the action taken or proposed. Such a change would be a change by due process of law. But the change

by legislative fiat involves an invasion by the legislature of the judicial field. To allow Congress to roll back rents in some areas to one date, in some areas to another, and leave other rents unaffected without any provision for administrative or judicial determination of the necessity or fairness of the measure is to destroy the protection intended by the Fifth Amendment. It is submitted that Congress never intended to assert such power and that the construction of Section 18 contended for by the petitioners is the correct one.

REASONS FOR GRANTING THE WRIT

The question presented by this case involves the proper construction, and the constitutionality as construed, of Federal legislation affecting the rights of a very large number of citizens of the United States. It raises a most important and significant question of the bounds of legislative power under the Constitution. It involves the deprivation of petitioners' valuable property rights without due process of law.

The decision of the Circuit Court of Appeals ignored the significance in construing the statute of the order issued by the administrator with respect to security deposits. It assumed the constitutionality of the legislation as construed without considering the contention that as so construed its provisions were discriminatory and trespassed the sphere of judicial power. The proper administration of justice requires consideration of these questions and correction of the Circuit Court's errors.

PRAYER

WHEREFORE, your petitioners pray that a Writ of Certiorari may issue directed to the United States Circuit Court of Appeals for the First Circuit commanding that Court to certify and to send to this Court a full and complete record of all proceedings of said Court in the above entitled cause to the end that said cause may be reviewed and determined by this Court as provided by law.

NEIL TOLMAN

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT

Jurisdiction is conferred on the Court by U.S. Code Title 28 Revised, Section 1254. The facts are stated in the Petition (Pages 3 and 4)

SPECIFICATION OF ERRORS

(1) The Court below misconstrued the proviso clause of Section 18 of the Emergency Price Control Act of 1947. It failed to give due consideration to the evidence of Congressional intention and administrative understanding that changes in the terms of a tenancy taking place between June 30, 1946, and July 26, 1946, should remain in force until changed by administrative order.

(2) The Court below failed to give due weight to the rule of law to the effect that if a statute is susceptible of two interpretations one of which would clearly be constitutional and the other of doubtful constitutionality the interpretation clearly constitutional should be adopted.

(3) The Act as construed by the Circuit Court of Appeals is unconstitutional in that it discriminates between persons similarly situated and having the same property rights without an adequate basis for the discrimination.

(4) The Act as construed by the Circuit Court of Appeals constitutes an improper assumption by Congress of judicial power.

ARGUMENT

The security deposit order (Amendment 97 to the Rent Regulation for Housing) as set forth in petitioners' contentions indicates the Price Administrator's understanding that

administrative action on his part was necessary to set aside or remedy the effect of transactions taking place during the interim period June 30, 1946, to July 25, 1946. Likewise the second proviso clause indicates Congressional contemplation that orders would have to be issued by the administrator to re-establish maximum prices. It is the contention of the petitioners that both Congress and the administrator contemplated that the type of determination and exercise of judgment by the administrator which were required for the original establishment of maximum prices under the provisions of the Emergency Price Control Act of 1942 (See **Bowles** v. **Willingham**, 321 U.S. 503, 88 L. Ed. 892) would have to be exercised anew before maximum prices as they existed before June 30, 1946, could be put into effect again, since an attempt by Congress to reinstate schedules previously in effect without providing for an administrative determination of the necessity and fairness for and of such prices, subject to judicial review, would be unconstitutional.

The contention that Congress intended by the second proviso clause in Section 18 of the Act to provide for renewed determinations by the administrator and judicial review thereof is supported not only by the fair import of the language employed, but by the familiar rule of law that "a statute must be construed if fairly possible so as to avoid grave doubts upon that score." **Panama Railway Company** v. **Johnson**, 68 L. Ed., 748 44 Sup. Ct. 391, 264 U.S. 375, and cases therein cited. It is submitted that this principle should guide this Court in the construction of Section 18 of the Act and the proviso clauses thereof.

It is also contended by the petitioners that Section 18 of the Price Control Extension Act, if construed as the government contends it should be, is unconstitutional as discriminating between landlords in defense-rental areas and landlords in other areas without adequate basis. Those outside defense-rental areas are permitted to receive an adequate return on their property; those within defense-rental areas may not be; yet the Act fails to provide a method for correcting this

discrimination. Such discrimination has been struck down in such cases as **Mayflower Farms, Inc. vs. Ten Eyck,** 56 Sup. Ct. 457; 297 U.S. 266, involving a discrimination between established dealers and those seeking to enter a field; **Wilson vs. MacDonell,** 265 F 432, Error dismissed 42 Sup. Ct. 46, 257 U.S. 665, involving a prohibition on eviction of tenants which discriminated unfairly in favor of owners of property unoccupied on the effective date of the regulation; and in **Louisville and Nashville Railroad Co.** v. **McChord,** 103 F 216

It is a fundamental principle of Constitutional Law of the United States that an undue invasion by any of the three major branches of Government, Executive, Judicial or Legislative upon the functions or prerogatives of another is improper. **Meriwether** v. **Garrett,** 102 U.S. 472, 515, 26 L. Ed. 197, 205.

The present case wherein we are considering the power of Congress to assume a function ordinarily committed to the charge of an administrative agency would seem to find its closest analogy for determining the proper bound between the exercise of legislative, executive and judicial powers in the rate making cases, which involve legislative declaration of policy, administrative implementation and execution of the same, and judicial control of the effect of regulation on individual and corporate property rights; with all being requisites of due process of law for the protection of the rights thereby affected. In one of the most recent rate making cases before the Court, **Baltimore and Ohio Railroad Company** v. **United States,** 298 U.S. 349, 56 Sup. Ct. 797, this question is treated at length. It was there held that Congress and its agent, the Interstate Commerce Commission, were without power to determine finally whether prescribed divisions on interstate hauls by more than one carrier were confiscatory to either carrier involved. The Court said, "Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law or its ascertainment." The Court further quoted with approval the following language from the decision in **Chicago, Milwaukee & St. Paul Railroad Company** v. **Minnesota,** 134

U.S. 418, 10 Sup. Ct. 462, "The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation requiring due process of law for its determination. If a company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself without due process of law and in violation of the Constitution of the United States * * * . The due process clause assures a full hearing before the Court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

Another field wherein proper division of function is held of great importance is that of takings by governmental authority. In **Monongahela Navigation Company** v. **United States,** 148 U. S. 312, 13 Sup. Ct. 622, it was held that a statute attempting to require omission of a certain factor from consideration in determining the amount of compensation payable violated the Fifth Amendment. The Court said in substance that while Congress might properly determine as a matter of policy what property should be taken, the task of setting a fair value on the thing taken was strictly a judicial function, the method of performing which Congress had no right to control. These precedents seem peculiarly applicable to such legislation as that under consideration in this case. The March 1, 1942, rent is claimed by petitioners to be confiscatory. The statute and regulations here involved do affect property rights just as rate regulation does and with similar consequences if the level set by the administrative or legislative branch are inadequate. However, if petitioners inadequate rent were set by administrative action petitioners would have a right to review by the Emergency Court of Appeals for determination of the question of necessity and propriety for the administrative action establishing the maxi-

mum rent. The petitioners are deprived of this right and, therefore, of due process, if their maximum rent has been established by non-reviewable legislative enactment.

The government relies on the decision in **Fleming** v. **Rhodes,** 331 U.S. 100, 91 L. Ed. 1368 and dicta in **Bowles** v. **Willingham,** 321 U.S. 503, 88 L. Ed. 892. It does not appear that the contention advanced by petitioners in this case was raised or discussed in **Fleming** v. **Rhodes.** The Appellees in that case are relied on the theory that they had acquired vested rights which neither legislative nor administrative action could divest them of. That contention is not made by petitioners here. The dicta in **Bowles** v. **Willingham** to the effect that Congress could properly set rent ceilings area by area throughout the nation in the same manner in which the price administrator did is of no more weight than the comment in the same opinion (Page 515 U.S., 903 L. Ed.) to the effect that if it attempted to do so Congress would be undertaking a task beyond its practical ability to perform. We submit that if the Court had considered the present contention it would have realized that for Congress to attempt to do so would be not only impractical but improper since the nature of the job to be performed, in setting rent ceilings based on varying dates in varying areas throughout the country which should take into due consideration economic factors present in different areas and which would be generally fair and equitable, requires the employment of more personnel with a more specialized knowledge of economics than the membership of Congress could be expected to contain. The proper procedure in this field as in the field of rate making and other specialized fields would appear to be laying down by Congress of a general policy and adequate standards and implementation of such policies and standards by a specialized administrative agency which agency when performing quasi-judicial functions would have its action subjected to judicial review.

Another basis of the decision in **Bowles** v. **Willingham** is the broad war powers of Congress to pass legislation which under other circumstances would be invalid as confiscatory.

It is submitted that on July 25, 1946, hostilities had come to an end and the war emergency which might have justified upholding a statute or regulation, normally invalid, in 1943 would not serve as justification for confiscatory legislation under 1946 conditions.

CONCLUSION

Section 18 of the Price Control Extension Act of 1947, as properly construed, exempted the rent increase effected by petitioners during the period between June 30, 1946, and July 26, 1946, and its continued collection by petitioners until further administrative order from its operation by virtue of the proviso clause therein. If otherwise construed, Section 18 of that Act is unconstitutional.

Respectfully submitted,

NEIL TOLMAN

Attorney for Petitioners